IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

T. L. CASHAW, III — PLAINTIFFS

V. — NO. 2:92CV46-B-O

CITY OF CHARLESTON, MISSISSIPPI, ET AL. — DEFENDANTS

MEMORANDUM OPINION

This cause comes before the court on the defendants' motion for partial summary judgment. This action was brought pursuant to 42 U.S.C. § 1983. The complaint alleges inter alia unlawful arrests without probable cause and excessive force. The plaintiffs seek actual and punitive damages. Police officers Vance and Page, in their individual capacity, move for partial summary judgment as to the excessive force claims on the ground of qualified immunity. Police Chief Williams and the City of Charleston [City] move for summary judgment. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

LAW

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'... that there is an absence of evidence to support the nonmoving party's case"). Under Rule 56(e) of the Federal Rules of

Civil Procedure, the burden shifts to the nonmovant to "go beyond the pleadings and by ... affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Rule 56(e). All legitimate factual inferences must be made in favor of the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the nonmovant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

I. Qualified Immunity

On November 22, 1991, the plaintiffs[1] were arrested in The Rattlesnake Bar located in Charleston, Mississippi. Lethaniel Reed claims that officers Page and Vance threw him against the wall. The officers allegedly threw Jerry Cashaw against a mirrored wall.

[1]Plaintiff James Reed's motion to voluntarily dismiss his claims was previously granted.

Jerry Cashaw testified in his deposition that the mirror cracked but that he was not hurt. After being transported to the jail, Reed claims that Officer Page aimed a gun at his head and threatened to "blow [his] brains out," tightened his handcuffs and then hit Reed in the mouth with his fist. Reed's lip bled "a little" but no stitches were required. Reed's medical records indicate a laceration to the mouth and a sprained wrist. Plaintiff Jerry Cashaw claims that Officer Vance kicked him in the back while he was handcuffed. He never sought medical attention for the alleged kick. Plaintiff T. L. Cashaw claims that Officer Vance hit him on the head and threw him over a copy machine while he was handcuffed. T. L. Cashaw admits that James Reed interrupted his fall. He further admits that he cannot produce any medical records to substantiate his claim that he sought medical attention as a result of the alleged blow to his head.

Officers Vance and Page contend that they are entitled to qualified immunity on the excessive force claims.[2] Under the shield of qualified immunity, an individual defendant is immune from personal liability from money damages even though his actions violated the plaintiff's constitutional rights. Davis v. Scherer, 468 U.S. 183, 191, 82 L. Ed. 2d 139, 147 (1984); Harlow v.

[2]The defendants concede that there are genuine issues of material fact with regard to the propriety of the plaintiffs' arrests. The excessive force claims are the only subject of the instant motion as it pertains to Officers Vance and Page.

Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 410 (1982). The Fifth Circuit recently stated:

> In addressing a claim of qualified immunity, this court engages in a two part analysis. The court first determines if the plaintiff has alleged a violation of a clearly established constitutional or statutory right. If so, the court then decides if the defendant's conduct was objectively reasonable.

Ganther v. Ingle, 75 F.3d 207, 210 (5th Cir. 1996). It is well settled:

> Qualified immunity protects a police officer from liability if a reasonable competent law enforcement officer would not have known that his actions violated clearly established law. Anderson v. Creighton, 483 U.S. 635, 639, 97 L. Ed. 2d 523 (1987). The objective reasonableness of the officer's conduct is measured with reference to the law as it existed at the time of the conduct in question.

Harper v. Harris County, Texas, 21 F.3d 597, 600 (5th Cir. 1994) (emphasis added). The defendants do not dispute that it is clearly established that

> if a law enforcement officer uses excessive force in the course of making an arrest, the Fourth Amendment guarantee against unreasonable seizure is implicated.

Id. At the time this cause of action arose, the controlling authority required proof of "a significant injury" resulting directly from the officer's use of excessive force. Johnson v.

Morel, 876 F.2d 477, 479-80 (5th Cir. 1989).[3]

The court in Johnson held:

> An officer's use of excessive force does not give constitutional import to injuries that would have occurred absent the excessiveness of the force, or to minor harms. Nor can transient distress constitute a significant injury.

Id. at 480. The court expressly declined to decide whether "a significant but non-physical injury would be legally sufficient" but noted the unlikelihood that "a significant injury will be caused by unnecessary force without significant **physical** injury." Id. at 480 n.1. The court in a later case did hold that fright and bad dreams resulting from being handcuffed and twice punched in the stomach and a deputy sheriff placing a revolver in the plaintiff's mouth and threatening "to blow his head off" did not amount to constitutionally significant injuries under the Johnson standard. Wisniewski v. Kennard, 901 F.2d 1276, 1277 (5th Cir.), cert. denied, 498 U.S. 926, 112 L. Ed. 2d 262 (1990). The Cashaws merely assert that they "complained of pain." Accordingly, the court finds that Officers Vance and Page are immune from personal liability for the Cashaws' excessive force claims.

The defendants contend that Reed's sprained wrist and

---

[3]Under the current law, "[a] plaintiff is no longer required to prove significant injury to assert a section 1983 Fourth Amendment excessive force claim." Harper v. Harris County, Texas, 21 F.3d at 600 (citing Hudson v. McMillian, 503 U.S. 1, 117 L. Ed. 2d 167 (1992)). The current standard governs the defendant officers' liability in their official capacity.

lacerated lip do not constitute significant injuries for purposes of qualified immunity. However, two of the cases cited by the defendants applied the prior "severe injury" test under Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981). See King v. Chide, 974 F.2d 653 (5th Cir. 1992); Raley v. Fraser, 747 F.2d 287 (5th Cir. 1984). The defendants characterize Reed's injuries as superficial injuries, similar to bruises. See Wise v. Carlson, 902 F.2d 417, 417-18 (5th Cir. 1990) (bruises on the plaintiff's chest wall and forearm and a hematoma on upper eyelid were superficial and not significant injuries). In Johnson, the plaintiff asserted in his affidavit that he was handcuffed so tightly that he sustained permanent scars on his wrists and employment disability for approximately two weeks. 876 F.2d at 478. The court held that the affidavit created a fact issue on the element of significant injury, precluding summary judgment on the excessive force claim. Id. at 480. The Fifth Circuit affirmed denial of a motion for summary judgment on the ground of qualified immunity in an action in which the plaintiff suffered "a badly bruised knee and a sore throat." Harper v. Harris County, Texas, 21 F.3d at 599, 601 (plaintiff alleged that officer grabbed her by the throat and struck her knee). Upon due consideration, the court finds a genuine issue of material fact regarding the nature of plaintiff Reed's injuries; his sprained wrist could reasonably be considered more than a superficial injury and the duration of the sprain has

not been established. Therefore, the officers are not entitled to qualified immunity at this time, with respect to Reed's excessive force claim.

II. Police Chief's Liability

The Police Chief moves for summary judgment on the federal claims of wrongful arrest and excessive force on the ground that there is no evidence of involvement on his part. Section 1983 liability cannot be predicated merely upon a **respondeat superior** theory. Monell v. Dep't of Social Services, 436 U.S. 658, 691, 56 L. Ed. 2d 611, 636 (1978). In order to state a viable cause of action pursuant to section 1983, the plaintiffs must "identify defendants who are either personally involved in the constitutional violation or whose acts are causally connected to the constitutional violation alleged." Woods v. Edwards, 51 F.3d 577, 583 (5th Cir. 1995) (citing Lozano v. Smith, 718 F.2d 756, 768 (5th Cir. 1983)).

The plaintiffs do not contend that the Police Chief was present during their arrests; they attempt to impose liability on him based on his alleged presence during the defendant officers' alleged use of excessive force at the jail. The Police Chief stated in his deposition that he arrived at the jail sometime after officers Vance and Page arrived with the plaintiffs. He further admitted that he witnessed Officer Page strike Reed. Reed's deposition testimony suggests that the Police Chief was present

when Officer Page aimed his gun at his face, threatened him, tightened his handcuffs and hit him in the mouth. The plaintiffs assert that "presumably" the Police Chief was also present in the jail when Jerry Cashaw was kicked in the back and L. T. Cashaw was struck and thrown over a copy machine.

The Police Chief contends that his presence during a one-time strike of Reed did not give him "a realistic opportunity to intervene to prevent [any] harm from occurring." Anderson v. Branen, 17 F.3d 552, 557, 558 (2d Cir. 1994) (even if officer had no opportunity to intervene at the outset, there was a close factual question as to whether he eventually had an opportunity in the sequence of events). A law enforcement official has an affirmative duty to intercede if he has reason to know of or observes use of excessive force. Id. at 557. The court in Anderson stated:

> Whether an officer had sufficient time to intercede or was capable of preventing the harm being caused by another officer is an issue of fact for the jury unless, considering all the evidence, a reasonable jury could not possibly conclude otherwise.

Id. According to Reed, Officer Page, prior to hitting him in the mouth, aimed a gun at him, threatened and cursed him and tightened his handcuffs for no apparent reason other than inquiries as to the reason for the arrests. Arguably the Police Chief was put on notice of unnecessary harassment that could foreseeably lead to excessive force. See Yang v. Hardin, 37 F.3d 282, 285 (7th Cir.

1994) ("At a minimum Officer Hardin could have...at least cautioned Officer Brown to stop). The court finds that there is a genuine issue of material fact as to the Police Chief's opportunity to intercede between Officer Page and Reed. In addition, the treatment of Reed did not occur in a vacuum and thus should be viewed in conjunction with the treatment of the Cashaws. The Police Chief's presence at the jail shortly after the plaintiffs' arrival creates a genuine issue of material fact as to whether he had arrived at the jail before the alleged incidents involving the Cashaws. Cf. Thompson v. Boggs, 33 F.3d 847, 857 (7th Cir. 1994) ("Officer Boggs' restraining and controlling of Thompson was accomplished before Officer Noble even had an opportunity to get out of his squad car"), cert. denied, 131 L. Ed. 2d 556 (1995). Since the Police Chief testified in his deposition that, in response to the dispatcher's call at approximately 11:45 p.m. and a request for assistance over his scanner, he drove to the jail for the specific purpose of checking on the circumstances surrounding the plaintiffs' arrests, his presence raises a factual issue as to any involvement on his part. Therefore, the court finds that the Police Chief is not entitled to summary judgment on the excessive force claims. He is, however, entitled to summary judgment on the wrongful arrest claims.

III. Alleged Failure to Train

The complaint alleges that the City is liable for failure to

train Officers Page and Vance not to engage in unconstitutional conduct. Since there is no **respondeat superior** liability under section 1983, the plaintiffs have the burden to prove that execution of a municipal policy, practice or custom was "the moving force [behind] the constitutional violation." Monell, 436 U.S. at 694, 56 L. Ed. 2d at 638. The Fifth Circuit has defined official policy as a "policy statement, ordinance, regulation or [officially adopted and promulgated] decision" or a "persistent, widespread practice of city officials or employees, which...is so common...as to constitute a custom." Bennet v. City of Slidell, 735 F.2d 861, 862 (5th Cir. 1984), cert. denied, 472 U.S. 1016, 87 L. Ed. 2d 612 (1985). The City's Code of Conduct prohibits unlawful arrests and specifically provides that officers "shall use only such force as is necessary in effecting an arrest." The plaintiffs cannot establish an officially adopted and promulgated policy as the basis of liability but do allege a policy of inadequate training of the City's police officers.

An inadequate training program represents city policy only if it amounts to policymakers' deliberate indifference evidenced by the likelihood of a constitutional violation and the obvious need for more or different training "in light of the duties assigned to specific officers or employees." City of Canton v. Harris, 489 U.S. 378, 390, 103 L. Ed. 2d 412, 427 (1989), cited in Cawthon v. City of Greenville, 745 F. Supp. 377, 382-83 (N.D. Miss. 1990)

("deliberate indifference to an obvious need for more adequate training with respect to the usual and recurring situations which police officers could be expected to encounter"). The "'deliberately indifferent' policy of training" must be "'closely related'" to the ultimate injury. Doe v. Taylor Indep. School Dist., 15 F.3d 443, 453 (5th Cir.), cert. denied, Lankford v. Doe, 130 L. Ed. 2d 25 (1994) (quoting City of Canton, 489 U.S. at 390, 391, 103 L. Ed. 2d at 427, 428).

Officer Vance attended and completed the Mississippi Law Enforcement Officer's Training Academy. Officer Page had not attended the academy but had received on-the-job training, including training through the Law Enforcement Television Network (LETN). Page had been tested on the LETN subject matter. The plaintiffs assert that the relevance of Officer Vance's academy training, in light of his alleged actions, is disputable. Such a conclusory allegation is insufficient to withstand a motion for summary judgment as to the City's liability. The Supreme Court in Canton observed:

> adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

489 U.S. at 391, 103 L. Ed. 2d at 428. The plaintiffs further assert that the documentation of Officer Page's LETN training does not address issues of probable cause or excessive force and the scope of Page's on-the-job training has not been presented to the

court. It is undisputed that Page, as well as Vance, had undergone law enforcement training and it is the plaintiffs' burden to present evidence that creates an issue of material fact as to the City's alleged failure to train.[4] Page's conduct on a single occasion does not alone raise an issue of material fact as to the adequacy of his training or the obviousness of any inadequacy. An stated in Canton, even an unsatisfactorily trained officer may have shortcomings resulting from "factors other than a faulty training program." 489 U.S. at 390-91, 103 L. Ed. 2d at 428. There is no showing that training independent of academy training is per se inadequate. The court notes that, with respect to on-the-job training, Page worked with Vance whose academy training is unsuccessfully challenged by the plaintiffs. Accordingly, the court finds that the plaintiffs have failed to present sufficient evidence to withstand the City's motion for summary judgment.

CONCLUSION

For the foregoing reasons, the court finds that the City is entitled to summary judgment, Officers Vance and Page are entitled to qualified immunity with respect to the Cashaws' excessive force claims, and the Police Chief is entitled to summary judgment as to the unlawful arrest claims. The court further finds that the instant motion as to the remaining issues is not well taken.

[4]The plaintiffs had the opportunity through discovery to determine the nature and scope of Officer Page's on-the-job training.

An order will issue accordingly.

THIS, the _____ day of July, 1996.

_____
NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE